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Supreme Court, U.S.
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In The

Supreme Court of the United States

BAYLOR UNIVERSITY,

Petitioner,

v.

VERNON G. JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of complete preemption, which permits the removal of cases filed in state court to federal court under federal question jurisdiction, has been construed too narrowly by a tripartite test developed by the Fifth Circuit in contravention of Supreme Court authority?

The Fifth Circuit has developed a three-part test for determining whether complete preemption exists so as to create federal question jurisdiction. This test is narrower than the tests used in other circuits and is in conflict with the tests used by other circuits. The test is also narrower than the tests prescribed by the United States Supreme Court in earlier cases addressing complete preemption.

2. Whether Pilot Records Sharing Act ("PRSA"), 49 U.S.C. § 44936, completely preempts state law so as to create federal question jurisdiction?

Congress enacted the PRSA, which requires previous employers of a commercial pilot to share records concerning the pilot, to reduce airline accidents caused by pilot error. Congress recognized that employers would be reluctant to share records for fear of liability suits by pilots, and Congress therefore completely preempted state law claims by pilots against former employers for sharing records.

PARTIES TO THE PROCEEDING

PETITIONER:

Baylor University
1201 South Fifth Street
Waco, Texas 76706

Baylor University is a Texas non-profit corporation. Baylor University has no parent company and has no stockholders.

RESPONDENT:

Vernon G. Johnson
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CITATIONS OF OPINIONS AND ORDERS

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 214 F.3d 630 and is reproduced in the Appendix.

The opinion of the United States District Court for the Western District of Texas, Waco Division, regarding whether the case is removable is not reported, but it is reproduced in the Appendix. The District Court's Judgment is also included in the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on June 22, 2000. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) as this is a petition for writ of certiorari for review of a judgment of a Court of Appeals.

STATUTES INVOLVED IN THE CASE

This case involves certain provisions of the Pilot Records Sharing Act ("PRSA"), 49 U.S.C. § 44936. Pertinent portions of the PRSA are set forth below.

> **(f) Records of employment of pilot applicants.** (1) In general. Subject to paragraph (14), before allowing an individual to begin service as a pilot, an air carrier shall request and receive the following information:
>
> * * *

(B) Air carrier and other records. From any air carrier or other person that has employed the individual as a pilot of a civil or public aircraft at any time during the 5-year period preceding the date of the employment application of the individual, or from the trustee in bankruptcy for such air carrier or person –

(i) records pertaining to the individual that are maintained by an air carrier (other than records relating to flight time, duty time, or rest time) under regulations set forth in –

(I) section 121.683 of title 14, Code of Federal Regulations;

(II) paragraph (A) of section VI, appendix I, part 121 of such title;

(III) paragraph (A) of section IV, appendix J, part 121 of such title;

(IV) section 125.401 of such title; and

(V) section 135.63(a)(4) of such title; and

(ii) other records pertaining to the individual that are maintained by the air carrier or person concerning –

(I) the training, qualifications, proficiency, or professional

competence of the individual, including comments and evaluations made by a check airman designated in accordance with section 121.411, 125.295, or 135.337 of such title;

(II) any disciplinary action taken with respect to the individual that was not subsequently overturned; and

(III) any release from employment or resignation, termination, or disqualification with respect to employment.

* * *

(B) Written consent; release from liability. An air carrier making a request for records under paragraph (1) –

(A) shall be required to obtain written consent to the release of those records from the individual that is the subject of the records requested; and

(B) may, notwithstanding any other provision of law or agreement to the contrary, require the individual who is the subject of the records to request to execute a release from liability for any claim arising from the furnishing of such records to or the use of such records by such air carrier (other

than a claim arising from furnishing information known to be false and maintained in violation of a criminal statute).

* * *

(5) Receipt of consent; provision of information. A person shall not furnish a record in response to a request made under paragraph (1) without first obtaining a copy of the written consent of the individual who is the subject of the records requested. A person who receives a request for records under this subsection shall furnish a copy of all of such requested records maintained by the person not later than 30 days after receiving the request.

(6) Right to receive notice and copy of any record furnished. A person who receives a request for records under paragraph (1) shall provide to the individual who is the subject of the records –

(A) on or before the 20th day following the date of receipt of the request, written notice of the request and of the individual's right to receive a copy of such records; and

(B) in accordance with paragraph (10), a copy of such records, if requested by the individual.

* * *

(g) Limitation on liability; preemption of State law. (1) Limitation on liability. No action or proceeding may be brought by or

on behalf of an individual who has applied for or is seeking a position with an air carrier as a pilot and who has signed a release from liability, as provided for under paragraph (2), against –

(A) the air carrier requesting the records of that individual under subsection (f)(1);

(B) a person who has complied with such request;

(C) a person who has entered information contained in the individual's records; or

(D) an agent or employee of a person described in subparagraph (A) or (B); in the nature of an action for defamation, invasion of privacy, negligence, interference with contract, or otherwise, or under any Federal or State law with respect to the furnishing or use of such records in accordance with subsection (f).

(2) Preemption. No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (f).

(3) Provision of knowingly false information. Paragraphs (1) and (2) shall not apply with respect to a person who furnishes information in response to a request made under subsection (f)(1), that –

(A) the person knows is false; and

(B) was maintained in violation of a criminal statute of the United States.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Plaintiff filed suit in state court on January 19, 1999, asserting that Baylor had tortiously interfered with his employment relationship with Kitty Hawk Air Cargo, Inc. ("Kitty Hawk"). Although Plaintiff did not serve Baylor with the suit, Baylor became aware of the suit, and Baylor removed the case to federal court on February 18, 1999 on the basis that federal question jurisdiction existed. The following week Baylor filed a Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim asserting that Plaintiff had not and could not allege an essential element of his claim. Plaintiff responded with a Motion to Remand and a request to extend the time to respond to the Motion to Dismiss until after the ruling on the Motion to Remand. The District Court granted Plaintiff's motion to extend the response time until after the ruling on the Motion to Remand.

On May 3, 1999, the District Court issued its order and opinion denying the Motion to Remand which then made Plaintiff's response to the Motion to Dismiss due on May 14, 1999. On May 17, 1999, Plaintiff filed another Motion for Extension of Time requesting an extension until June 7, 1999 to respond to the Motion to Dismiss. The Court gave Plaintiff even more time than he requested and allowed him until July 1, 1999 to respond to the Motion to Dismiss. Plaintiff failed to respond to the Motion to Dismiss, and, on July 7, 1999, the Court dismissed the case for Plaintiff's failure to state a claim. Plaintiff did not file a motion to reconsider or offer any

excuse for his failure to respond to the Motion to Dismiss and instead filed a Notice of Appeal.

The case was fully briefed before the Fifth Circuit, and, on May 1, 2000, the Fifth Circuit heard oral argument. The Fifth Circuit issued its opinion and judgment on June 22, 2000 in which the Fifth Circuit reversed the judgment of the District Court and remanded the case to the District Court with the instruction to remand the case to state court.

Statement of Material Facts

Baylor employed Plaintiff as a corporate pilot from January 1992 until August 1994. Baylor terminated Plaintiff's employment due to Plaintiff's appearance and grammar. Plaintiff first filed suit against Baylor alleging violations of the Americans with Disabilities Act and the Rehabilitation Act. *See Johnson v. Baylor University,* Cause No. W-96-CV-242 (W.D. Tex. 1997). The District Court granted summary judgment, the Fifth Circuit affirmed the summary judgment, and the United States Supreme Court denied Plaintiff's Petition for Writ of Certiorari. *See Johnson v. Baylor University,* 118 S. Ct. 1050, 140 L. Ed.2d 113 (1998); *Johnson v. Baylor University,* 129 F.3d 607 (5th Cir. 1997).

Plaintiff then filed a second suit against Baylor alleging a single cause of action for tortious interference with employment. Plaintiff alleges that he obtained employment with Kitty Hawk and entered training with Kitty Hawk. Pursuant to the Pilot Records Sharing Act, 49 U.S.C. § 44936, Kitty Hawk sought certain information from Baylor concerning Plaintiff. Plaintiff alleges that

Baylor made false representations concerning Plaintiff to Kitty Hawk and that Baylor failed to provide available information concerning Plaintiff to Kitty Hawk. According to Plaintiff, Baylor's alleged actions and inactions tortiously interfered with his employment relationship with Kitty Hawk and caused him to lose his position at Kitty Hawk. While Baylor disputes much of Plaintiff's versions of the facts, for the purpose of the proceedings below, the facts pled by Plaintiff were presumed to be true.

Basis for Federal Jurisdiction in District Court

Baylor asserts that the District Court had federal question jurisdiction under 28 U.S.C. § 1331. This Petition deals solely with the issue of jurisdiction; thus, the jurisdictional issue will be discussed in more detail below.

REASONS FOR GRANTING THE WRIT

I.

There is a Conflict in the Circuits Concerning the Doctrine of Complete Preemption Which Should be Resolved by this Court

There is a substantial conflict among the Circuit Courts of Appeal regarding the application of the doctrine of complete preemption to permit removal jurisdiction. Before outlining the full scope of the conflict, a brief description of the concept of complete preemption is necessary to place the issues in context.

For a federal district court to have removal jurisdiction, 28 U.S.C. § 1441(a) requires that the case be one over which the district courts of the United States have original jurisdiction. In the present case, we are concerned with federal question rather than diversity jurisdiction or some other form of jurisdiction. In order for a federal district court to have federal question jurisdiction, the case must arise under the Constitution, laws, or treatises of the United States. 28 U.S.C. § 1331. In general, a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law. This is, quite naturally, known as the well-pleaded complaint rule. The plaintiff is considered to be the master of his complaint, and the plaintiff can generally choose to remain in state court by foregoing his federal claims. The existence of a federal defense generally does not create federal jurisdiction because it is not a part of the well-pleaded complaint.

A corollary to the well-pleaded complaint doctrine "is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). Complete preemption is jurisdictional in nature rather than simply an affirmative defense. As such, it authorizes removal to federal court even if the complaint is artfully pleaded to include only state law claims for relief or if the federal issue is raised solely as a defense. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 (1981). Over the years the Circuit Courts of Appeal have developed a

number of different tests for determining whether complete preemption exists, and these tests have now diverged to the point where there is a significant conflict among the Circuits. Under the varying tests, a particular statute could be found to create complete preemption in one circuit while not creating complete preemption within another circuit.

In this case, the Fifth Circuit has reiterated a three-part test for establishing complete preemption which the Fifth Circuit first announced last year in *Heimann v. National Elevator Indus. Pension Fund*, 187 F.3d 493 (5th Cir. 1999).[1] This test requires a defendant to show the following three elements to demonstrate complete preemption:

(1) the statute must contain a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law,

(2) the statute must make a specific jurisdictional grant to the federal courts for enforcement of the right, and

---

[1] Before developing this test, the Fifth Circuit followed a substantially different test that was much closer to that of the circuits discussed below. In *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990), the Fifth Circuit held that the preemption language in the Airline Deregulation Act, 49 U.S.C. § 1305(a)(1), which is virtually identical to the language in the PRSA, showed that Congress did intend to preempt so completely the particular area of state law at issue as to preclude state court actions and to create federal jurisdiction for purposes of removal.

(3) there must be a clear Congressional intent that claims brought under the federal law be removable.

Johnson, 214 F.3d at 632; *Heimann*, 187 F.3d at 500.

No other circuit appears to use such an exacting tripartite test. The Tenth, Sixth, and Ninth Circuits follow a two-part test that requires the presence of the following two elements:

(1) the federal statute or regulation must preempt the relied-upon state law, and

(2) Congress intended to allow removal by providing a federal cause of action.

Schmeling v. NORDAM, 97 F.3d 1336 (10th Cir. 1996); *Strong v. Teletronics Pacing Systems, Inc.*, 78 F.3d 256 (6th Cir. 1996); *Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996). The Third Circuit also follows a similar but somewhat narrower test. *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995).

The Fourth, Seventh, and Eighth Circuits follow less narrow standards than do the Tenth, Sixth, Ninth, and Third Circuits, and the tests in the Fourth, Seventh, and Eighth Circuits are in substantial conflict with the extremely narrow test of the Fifth Circuit. The Fourth Circuit allows removal based on complete preemption when "an area of state law has been [so] completely preempted, [that] any claim purportedly based on th[e] preempted state law is considered . . . a federal claim." *Rosciszewski v. Arete Associates, Inc.*, 1 F.3d 225, 231 (4th Cir. 1993). The Seventh and Eighth Circuits follow a similar analysis. *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257 (8th

Cir. 1996); *Matter of Amoco Petroleum Additives Co.*, 964 F.2d 706 (7th Cir. 1992).

The decision of the Fifth Circuit is in direct conflict with the decision of the First Circuit in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989). In *French*, the plaintiff pilot was accused of using marijuana while off duty. Plaintiff's employer demanded that plaintiff submit to a urine test to confirm or dispel the accusation. Plaintiff refused to submit to the request, contending that a Rhode Island statute regulating drug testing did not permit a drug test under the circumstances. Pan Am terminated plaintiff's employment, and plaintiff brought suit in state court alleging a violation of the state statute. Pan Am removed the case to federal court and asserted that plaintiff's claims were preempted. The First Circuit agreed and held that preemption was implied by the comprehensive legal scheme concerning air safety. *Id.* at 4. Although the *French* case did not involve a federal statute containing an express preemption provision such as the provision in the PRSA, the First Circuit nevertheless found implied complete preemption because Congress intended to occupy the field of pilot regulation related to air safety thus holding that removal was proper even without the presence of any statute stating state law was expressly preempted.

The PRSA is just a further part of the comprehensive regulation of air safety. The First Circuit would clearly find that there is federal jurisdiction in this case based on complete preemption, both by reason of the express provision of PRSA and by implication because Congress has occupied the field of pilot regulation. "The intricate web of statutory provisions affords no room for the imposition

of state law criteria vis-a-vis pilot suitability." *Id.* at 4. The Fifth Circuit, on the other hand, has reached the opposite conclusion on whether a federal aviation safety statute creates federal jurisdiction justifying removal by reason of the complete preemption of the area of law thus making any claim asserted federal in nature.

As can thus be seen, there is a substantial and apparent conflict among the circuits as to the appropriate test for determining whether a particular statute creates complete preemption sufficient to support removal jurisdiction. The conflict is so substantial that the statute at issue in this case, the Pilot Records Sharing Act, has been held not to create removal jurisdiction in the Fifth Circuit but would clearly be found to create removal jurisdiction in a number of other circuits. The First Circuit does not even require the existence of an express preemption provision in order for there to be removal jurisdiction when pilot regulation related to air safety is involved. The Fifth Circuit, on the other hand, will not allow removal based on federal preemption even when a federal statute relating to pilot regulation and air safety contains an express preemption provision. In light of this conflict among the circuits, the Supreme Court should grant certiorari to resolve the conflict and to provide the lower courts with guidance for determining whether complete preemption exists in future cases.

II.

This Case Raises Important Recurring Questions of Federal Law that are Unresolved and that Should be Resolved by this Court

Although the Supreme Court has written on the subject of complete preemption on a number of occasions, some of the lower courts continue to exhibit confusion concerning the doctrine and continue to resist implementation of the doctrine as a basis for federal jurisdiction that justifies removal. As demonstrated by the Fifth Circuit's decision in this case and by the other cases cited in the preceding section, this case presents important recurring questions of federal law that should be resolved by this Court.

The Supreme Court first recognized preemption as a basis for removal over thirty years ago. *Avco Corp. v. Aero Lodge 735*, 390 U.S. 557 (1968). In *Avco*, the defendants removed to federal court a state law contract claim based on the violation of a collective bargaining agreement. The Supreme Court upheld removal because the state law in the area of labor relations had been absorbed as federal law. The Court next addressed preemption removal thirteen years later in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). In *Federated*, the Court found that removal jurisdiction existed over a subsequent state court antitrust action which was similar to a previously filed federal court action based on federal antitrust law.

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), the Court, in finding that the Employee Retirement Income Security Act ("ERISA") did not create removal jurisdiction because ERISA does not

completely preempt state law in the area of employer/employee relations, nevertheless observed that "if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Id.* at 24. A few years later, the Court revisited the ERISA issue and extended complete preemption to certain ERISA claims. *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). The Court stated that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64.

Two months after the *Metropolitan Life* decision, this Court again addressed the doctrine of complete preemption in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). The Court made clear that "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* at 393. In *Caterpillar*, the Court of Appeals fashioned a test for complete preemption that required the federal law to provide both a superseding cause of action to replace the state law cause of action and to preempt the state law in order for complete preemption to exist. The elements of this test are present in the Fifth Circuit's test. Notably, the Supreme Court rejected this test as being "squarely contradicted by our decision in *Avco*." *Id.* at 391 n. 4. While the issue in the case was not jurisdiction, this Court again had occasion to address the scope of the preemptive provision of the Airline Deregulation Act in *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374 (1992). The Court held that "preemption

may be express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* at 383.

Despite the clear indications from this Court that the test for complete preemption should not be as restrictive as the test developed by the Fifth Circuit, the Fifth Circuit and several other circuits continue to devise tests which contravene this Court's pronouncements on complete preemption. Among the circuits there remain unresolved questions about the scope of the doctrine of complete preemption. As the Fifth Circuit's decision in this case indicates, these unresolved questions will continue to recur, and this Court should grant certiorari to resolve these issues and to give the lower courts guidance.

This case raises important questions which can only be resolved by this Court. These questions concern both the scope of federal jurisdiction and the extent to which state laws can encroach upon the federal regulation of air safety. Under the test articulated by the Fifth Circuit, the doctrine of complete preemption disappears as the Fifth Circuit will allow removal only when there is an express grant of federal jurisdiction. If an express grant of jurisdiction is required, then any type of preemption, no matter how complete, will be insufficient to create federal jurisdiction unless the express grant also exists. If there is an express grant of federal jurisdiction, then there is no need for complete preemption and the doctrine will cease to exist and to serve the purposes for which it was developed.

The doctrine of complete preemption exists to address the situation presented by this case. Air safety is extensively regulated by federal law, and, with respect to the PRSA, Congress has expressly stated that the states are not to have any laws which regulate pilot record sharing. In fact, the legislative history of the statute demonstrates that lawsuits by pilots were of significant concern to Congress and that is why the preemption provision was included.[2] Under the Fifth Circuit's interpretation of complete preemption, state tort law will now regulate pilot record sharing with precisely the opposite result intended by Congress.

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[2] The Committee Report accompanying the Senate Bill provided:

> The immunity provisions of [the PRSA] would prevent lawsuits with respect to the furnishing or using of records against the prospective employing air carrier, as well as the past or current employer, who comply with these provisions, except in those unusual circumstances in which the person who furnishes the information knows it is false, and maintained such false information in violation of U.S. criminal law. *The preemption provision in [the PRSA] is intended to ensure that no lawsuit may proceed on the federal or state level, and no state shall enact any law or regulation, that seeks to impose liability for the furnishing or use of covered records.* The Committee believes these provisions are essential to deter the filing of frivolous lawsuits that allege "falsity".

S. REP. No. 333, 104th Congress, 2nd Sess. (1996) (emphasis added).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: September 20, 2000.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 99-50779

VERNON G. JOHNSON,
Plaintiff-Appellant,

V.

BAYLOR UNIVERSITY,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
W-99-CV-65. Walter S Smith, Jr, US District Judge.

June 22, 2000, Decided

Before POLITZ, SMITH and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Vernon Johnson appeals a judgment of dismissal, including an earlier denial of his motion to remand to state court his state law claim for tortious interference with contract. Concluding that the Pilot Records Sharing Act ("PRSA"), 49 U.S.C. § 44936, does not completely preempt state law claims so as to create federal question jurisdiction, we reverse and remand to the district court with instruction to remand to state court.

I.

Johnson, a pilot working for Baylor University ("Baylor"), was fired for chronic obesity and poor grammar. He sued Baylor in state court, alleging violations of the Americans with Disabilities Act and the Rehabilitation Act. According to the complaint, Johnson had been Baylor's chief pilot until his employment was terminated because of his chronic obesity. He alleged that his termination constituted improper discrimination on the basis of a disability. Baylor removed to federal court, which granted summary judgment in its favor, and we affirmed. See *Johnson v. Baylor Univ.*, 129 F.3d 607 (5th Cir.1997).

While the discrimination lawsuit was pending, Johnson obtained employment with Kitty Hawk Air Cargo, Inc. ("Kitty Hawk"), and began training. When Kitty Hawk sought his employment records from Baylor, the university replied that Johnson had been discharged for misconduct, that he was ineligible for rehire, and that his general personnel records were unavailable.

Johnson again sued in state court, alleging tortious interference with employment, contending that Baylor's statements to Kitty Hawk were false and caused his employment with Kitty Hawk to be terminated. Baylor again removed to federal court, based on its contention that Johnson's state-law claim for tortious interference was preempted by the PRSA; Baylor also moved to dismiss for failure to state a claim, reasoning that § 44936(g), entitled "limitation on liability; preemption of State law," precluded Johnson's state-law tort action. It argued that § 44936(g)(3) allows for liability only when a person

knowingly has provided false information to an air carrier and that information has been maintained in violation of a federal criminal statute.

Johnson moved to remand to state court, noting that § 44936(g)(1) operates to limit the liability only of "a person who has complied with [a] request" from an air carrier for a person's employment records. Accordingly, Johnson argued that Baylor had not "complied" with Kitty Hawk's request, (1) because it had not followed the requirements of § 44936(f)(6) that he be notified of Kitty Hawk's request and had not provided him with an opportunity to request copies of the records to be furnished, and (2) because it had not turned over Johnson's personnel file, which indicated that he was a skilled pilot whose employment had been terminated solely because of his appearance. In sum, Johnson's argument was that while § 44936 constituted a possible defense to his tort action, that defense was unavailable to Baylor.

Baylor contended that jurisdiction in the district court was proper because the field of aviation is heavily regulated by the federal government. It also asserted that § 44936(g)(2)'s preemption provision impliedly confers jurisdiction on the federal court, because if federal jurisdiction could be defeated merely by an allegation that a person had not sufficiently responded to an air carrier's request for employment records, the preemptive scope of § 44936(g) would be gutted.

The district court denied Johnson's motion to remand and held that § 44936(g) expressly and impliedly preempts state-law actions such as Johnson's. It also granted

Baylor's motion to dismiss, holding that Johnson's claim is not encompassed by § 44936.

II.

Johnson argues that the district court did not have removal jurisdiction and should have remanded, because no federal question is presented on the face of his well-pleaded complaint. He asserts that § 44936 provides only a federal defense to his state-court lawsuit, a defense that could be raised in state court on remand. Specifically, he argues that the PRSA effects not "complete" preemption of state law, but, instead, only "ordinary" preemption. Section 44936 provides, in pertinent part:

> (g) Limitation on liability; preemption of State law –
>
> (1) Limitation on liability. – No action or proceeding may be brought by or on behalf of an individual who has applied for or is seeking a position with an air carrier as a pilot, and who has signed a release from liability, as provided for under paragraph (2), against –
>
> (A) the air carrier requesting the records of that individual under subsection (f)(1);
>
> (B) a person who has complied with such request;
>
> (C) a person who has entered information contained in the individual's records; or
>
> (D) an agent or employee of a person described in subparagraph (A) or (B);

in the nature of an action for defamation, invasion of privacy, negligence, interference with contract, or otherwise, or under any Federal or State law with respect to the furnishing or use of such records in accordance with subsection (f).

> (2) Preemption. – No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (f).

For the district court to have removal jurisdiction, 28 U.S.C. § 1441(a) requires that the case be one over "which the district courts of the United States have original jurisdiction." The original jurisdiction alleged by Baylor is "federal question" jurisdiction – i.e., that the case is one "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Accordingly, "it is well-settled that a cause of action arises under federal law only when the plaintiffs well-pleaded complaint raises issues of federal law." *Heimann v. National Elevator Indus. Pension Fund*, 187 F.3d 493, 499 (5th Cir.1999).

A corollary to the well-pleaded complaint doctrine "is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)). "Complete preemption," which creates federal removal jurisdiction, differs from more common "ordinary preemption" (also known

as "conflict preemption"), which does not. *Id.*[1] This distinction has led to the following observation:

> Ordinarily, the term federal preemption refers to ordinary preemption, which is a federal defense to the plaintiff's suit and may arise either by express statutory term or by a direct conflict between the operation of federal and state law. Being a defense, it does not appear on the face of a well-pleaded complaint, and, thus, does not authorize removal to a federal court. By way of contrast, complete preemption is jurisdictional in nature rather than an affirmative defense to a claim under state law. As such, it authorizes removal to federal court even if the complaint is artfully pleaded to include solely state law claims for relief or if the federal issue is initially raised solely as a defense.

Heimann, 187 F.3d at 500 (internal citations omitted).

Complete preemption is a narrow exception: "The Supreme Court has clearly sanctioned the rule only in the area of federal labor relations and the Employee Retirement Income Security Act of 1974." *Waste Control Specialists, LLC v. Envirocare, Inc.*, 199 F.3d 781, 784 (5th Cir.), opinion withdrawn and superseded in part on reh'g on other grounds, 207 F.3d 225 (5th Cir.2000). To establish complete preemption, Baylor must show that

> (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state

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[1] *See also Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 336-37 (5th Cir.1999); *McClelland v. Gronwaldt*, 155 F.3d 507, 515 (5th Cir. 1998).

> law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is a clear Congressional intent that claims brought under the federal law be removable.

Heimann, 187 F.3d at 500. "Few federal statutes can meet such an exacting standard." *Id.*

Because *Heimann* was decided after the district court dismissed Johnson's claim, it did not have the benefit of that holding in its consideration of Johnson's motion to remand. Rather than proceeding under the *Heimann* tripartite test for complete preemption, the court merely relied on ordinary-preemption principles. *Heimann* makes plain that § 44936 does not meet any of the three required criteria.

First, the PRSA contains no civil enforcement provision. The closest provision is § 44936(g)(3), which states that the limitation-on-liability and state-law-preemption sections are not applicable to persons who furnish false information that was "maintained in violation of a criminal statute of the United States." This provision does not create any cause of action, however, nor does it replace state law tort claims,[2] but it merely provides that the federal affirmative defense will not be available in certain instances.

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[2] *Cf. Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1164 (5th Cir.1989) (holding there was no express preemption, because the Longshore and Harbor Workers' Compensation Act contains no civil enforcement provision, and rejecting the idea that an "express denial" of a state-law cause of action was sufficient to grant removal jurisdiction, else the well-pleaded complaint rule would have no vitality).

Second, § 44936 does not provide a specific jurisdictional grant to federal courts for enforcement of the air carriers' rights. Indeed, subsection (g), like the rest of the PRSA, is silent with respect to jurisdiction.[3]

Baylor concedes that the Act contains no specific jurisdictional grant to the federal courts, but it argues that this prong was intended to apply only to ERISA claims like the one presented in Heimann. But Heimann was not so limited. Significantly, its three-part test was considered to be a "general" one, and the court noted that "this test should be 'applied with circumscription to avoid difficult issues of federal-state relations,' and accordingly few federal statutes can meet such an exacting standard." *Id.* (internal citations omitted). The court did not mention ERISA or any other statute in establishing the three factors, and, accordingly, Baylor has presented us with no reason not to apply those factors to the PRSA.

Finally – under the third prong – there are no indications in the PRSA or its legislative history of a clear congressional intent that these types of claims should be removable. Instead, Baylor makes a more general argument that "there is probably no other area in which there is more federal regulation than in the field of aviation." It also relies heavily on *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir.1990), for the proposition that "Congress may so completely preempt a particular area,

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[3] *Cf. id.* at 1165 (contrasting the LHWCA to ERISA and the LMRA, which have specific jurisdictional grants and which completely preempt state law in some circumstances).

that any civil complaint raising this select group of claims is necessarily federal in character."

Trans World is not controlling. First, a recitation of the general complete-preemption principle, without application of the specific tripartite test, is no longer sufficient after *Heimann*, which requires a clear statement by Congress that state-law claims will be removable. Moreover, *Trans World's* interpretation was of the Federal Aviation Act, not the PRSA, and its holding should extend only to the principle that "Congress did intend to preempt completely the particular area of state laws relating to rates, routes, or services . . . to maintain uniformity and *to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states.*" *Id.* (emphasis added, internal quotation marks omitted).

Here, there is no similar showing of congressional intent with respect to removal. Likewise, there is no serious danger that allowing Johnson's tortious interference claim will result in confusion or undue burdens on air carriers.

A remand to state court does not undermine Baylor's protections under § 44936. Instead, Baylor still is free to assert § 44936 as a federal defense to Johnson's state law claim. And to the extent that Baylor complied with subsection (f)(1)'s requirements for providing pilot information following Kitty Hawk's request, Baylor still will be immune from liability under either federal or state law in accordance with § 44936(g)(1).

Finally, our caselaw refutes the idea that aviation is generally a field of complete preemption. In *Hodges v.*

Delta Airlines, Inc., 44 F.3d 334, 338 (5th Cir.1995) (en banc), we held that a plaintiff's state law negligence claim for damages was not preempted by the Airline Deregulation Act ("ADA"), 49 U.S.C. § 1305(a)(1). We reasoned that "neither the ADA nor its legislative history indicates that Congress intended to displace the application of state tort law to personal physical injury inflicted by aircraft operations, or that Congress even considered such preemption." *Id.* Important to this conclusion was the fact that the ADA did not contain federal causes of action like those provided for in ERISA legislation. *Id.* at 338 n. 8. So too for the PRSA – it confers no federal cause of action, and there is no evidence that Congress intended to make state law claims removable.

Thus, § 44936's preemption provision and resulting affirmative defense are insufficient, without more, to create federal question jurisdiction. Because the PRSA does not meet any of the three required criteria under *Heimann*, it does not completely preempt state law, and removal was improper.

The judgment is REVERSED and REMANDED with instruction to remand to state court.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

VERNON G. JOHNSON, Plaintiff V. BAYLOR UNIVERSITY, Defendant	CIVIL ACTION NO. W-98-CA-065

JUDGMENT

In accordance with its previous Order granting Defendant's Motion to Dismiss, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss is **GRANTED** and this action is **DISMISSED**.

SIGNED this 7th day of July, 1999.

WALTER S. SMITH, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

VERNON G. JOHNSON, Plaintiff V. BAYLOR UNIVERSITY, Defendant	CIVIL ACTION NO. W-98-CA-065

ORDER

This removal action arises out of Plaintiff's assertion that Defendant tortiously interfered with his relationship with another employee by failing to furnish information and by furnishing false information regarding his employment with Defendant. Defendant contends that Plaintiff's claims are pre-empted by the Pilot Records Sharing Act, 49 U.S.C. § 44936. Having reviewed Defendant's motion and Plaintiff's response, the Court is persuaded Plaintiff's state law claims are pre-empted.

Pre-emption may be either express or implied and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales v. Trans World Airlines*, 504 U.S. 374, 383 (1992), citing *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990).

> The question, at bottom, is one of statutory intent, and we accordingly " 'begin with the language employed by Congress and the assumption that the ordinary meaning of that

> language accurately expresses the legislative purpose.' " *Holliday, supra,* 498 U.S., at 57, 111 S. Ct., at 407; *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S.Ct. 658, 661-662, 83 L.Ed.2d 582 (1985).

Morales, 504 U.S. at 383. State common law rules may be pre-empted in the same manner as state statutes or regulations so long as Congressional intent is clear. Implied federal pre-emption exists in three circumstances: (1) when "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); (2) when there is pervasive federal regulation in the field, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); or (3) when state law conflicts with federal law, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,* 461 U.S. 190, 204 (1983).

Section 44936(g) contains express pre-emption language and provides

> No State or political subdivision thereof may enact, prescribe, issue, continue in effect, or enforce any law (including any regulation, standard, or other provision having the force and effect of law) that prohibits, penalizes, or imposes liability for furnishing or using records in accordance with subsection (f).

Specifically excluded from pre-emption are actions against persons who furnish information in response to a request under subsection (f)(1) that the person knows is false and that was maintained in violation of a criminal statute of the United States.

Although Plaintiff argues that Defendant's failure to provide information takes it out of the ambit of the Act, the Court disagrees. Plaintiff's claims necessarily require an analysis of the Act, which therefore requires pre-emption. Accordingly, it is the Act, which therefore requires pre-emption. Accordingly, it is

ORDERED that Plaintiff's Motion to Remand is **DENIED.**

SIGNED this 3rd day of May, 1999.

WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

(2)

00-451

No. _____

Supreme Court, U.S.
FILED
OCT 23 2000
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In The
Supreme Court of the United States

BAYLOR UNIVERSITY,

Petitioner,

v.

VERNON G. JOHNSON,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Vernon G. Johnson ("Johnson"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Baylor University ("Baylor"), seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on June 22, 2000.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below

Johnson filed suit in state district court on January 19, 1999, claiming that Baylor had tortiously interfered with his employment relationship with Kitty Hawk Air Cargo, Inc. ("Kitty Hawk"). Baylor removed the case to federal court on February 18, 1999, asserting that federal question jurisdiction existed based on the Pilot Records Sharing Act ("PRSA"), 49 U.S.C. § 44936. Johnson promptly filed a Motion to Remand on March 2, 1999, contending that 49 U.S.C. § 44936 merely provided a defense that would limit Baylor's liability in Johnson's state court case if Baylor had complied with the statute when Kitty Hawk requested that Baylor furnish Johnson's employment records. Baylor also filed a Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim asserting that Johnson's pleadings did not allege that Baylor had knowingly furnished false information in violation of a criminal statute of the United States as provided in 49 U.S.C. § 44936 (g)(3). At Johnson's request, the Court held in abeyance the Motion to Dismiss pending ruling on the Motion to Remand.

On May 3, 1999, the U.S. District Court issued its order and opinion denying Johnson's Motion to Remand. Because the Court's Order denying Remand affirmed Baylor's contention that Johnson had no cause of action against Baylor except a cause of action as described in 49 U.S.C. § 44936 (g)(3), Johnson did not respond to Baylor's Motion to Dismiss and on July 7, 1999, the District Court dismissed Johnson's case.[1]

Johnson filed his Notice of Appeal. The case was fully briefed and was orally argued before the Fifth Circuit, which rendered its Opinion and Judgment on June 22, 2000, reversing the judgment of the District Court and remanding the case to the District Court with instruction to remand the case to state court. Baylor filed no Petition for Review or for En Banc Hearing.

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[1] In Baylor's Statement of the Case, Baylor attempts to cast aspersions on Plaintiff's counsel for requesting additional time to respond to Baylor's Motion to Dismiss and then not responding and not "offer[ing] any excuse" for not responding. Although Baylor's statements are totally irrelevant to the issues in its Petition, Plaintiff's counsel would show that the record in this case reflects that Plaintiff's counsel was involved in pre-trial and trial in another case against Baylor beginning on May 3, 1999 and continuing until the jury returned its verdict against Baylor on June 11, 1999. Thus, Plaintiff's counsel did not have an opportunity to review the Court's May 3rd Order and consult with Johnson until after June 11, 1999; whereupon Johnson decided to rely on the Order denying Remand as the basis for his appeal.

Statement of Material Facts[2]

Johnson was employed as Baylor's Chief Pilot beginning on January 1, 1992. His employment was terminated on August 26, 1995. The primary reason for the termination was unrelated to his skill as a pilot. Instead, the termination was expressly related to Johnson's chronic obesity, which Baylor stated "diminished his professionalism" and thus "diminished the image" of the University and made it impossible for Johnson to represent the university as it should be represented.

Johnson filed suit against Baylor, contending that Baylor discriminated against him on the basis of his chronic obese condition which Baylor perceived to be a disability. Although Baylor admitted that the termination of Johnson's employment was related to his obesity, Baylor contested Johnson's claim of discrimination, contending that his obesity did not qualify as a disability under the law because it did not prevent him from obtaining employment in a job class or with other employers.

In the course of proceedings, Dr. Herbert Reynolds, who had been Johnson's supervisor and who had made the decision to terminate Johnson's employment, admitted that Johnson was an excellent pilot and contended that Johnson could work as a pilot in positions that did not require him to interact with the public, e.g. as a pilot for an air freight

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[2] As acknowledged by Baylor, the material facts in this case are the facts as stated in Johnson's "well-pleaded" complaint. Thus, Johnson's "Statement of Facts" includes the material facts as they are stated in the actual complaint, rather than as restated by Baylor.

company, but that his appearance prevented him from continuing to be employed as Baylor's chief pilot because that position required him to interact with potential donors and VIPs and Johnson's appearance was not consistent with the image that Baylor was striving to represent to such persons.

Ultimately, Johnson's disability suit was dismissed based on the Court's ruling that Johnson's obesity did not qualify as a disability protected by laws prohibiting discrimination because Johnson's physical condition was not perceived to be sufficiently disabling to prevent him from obtaining employment with other employers and/or in other positions (e.g. air freight).[3]

In August of 1997, Johnson obtained employment with Kitty Hawk Air Cargo, Inc. and Kitty Hawk began training Johnson for the position immediately thereafter. In the pre-employment interview, Johnson advised Kitty Hawk that he had been discharged from his employment at Baylor because of his overweight physical condition. Kitty Hawk required verification of Johnson's employment history, including verification of the reason(s) for Johnson's discharge from Baylor. The investigation of Johnson's employment history was begun during the time that Johnson was in training.

After Johnson completed the first phase of Kitty Hawk's training, he was entitled to a period of leave before

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[3] The District Court dismissed the case on February 12, 1997. Johnson appealed to the Fifth Circuit and on September 18, 1997. The Fifth Circuit affirmed the decision of the District Court.

resuming his training/employment. He was told that he was to return to work on or about September 26, 1997. The day before Johnson was scheduled to return to Kitty Hawk, he received notice that he was being removed from the training schedule and employment at Kitty Hawk.

In about March of 1998, Johnson discovered that his termination by Kitty Hawk was related to information furnished (and not furnished) by Baylor during Kitty Hawk's pre-employment background check. Specifically, Baylor told Kitty Hawk that Johnson had been discharged for "misconduct" and was "ineligible for rehire." When Kitty Hawk requested more specific information from Baylor, in an effort to confirm or contradict Johnson's statement that he was discharged because of his overweight condition, Baylor stated that no more specific information was available because Johnson's employment records were not readily available.

Johnson's original complaint in state court stated that "Baylor's representations to Kitty Hawk were false, and Baylor knew or should have known that the representations were false, and were made with reckless disregard for Johnson's rights. At the time that Baylor represented that Johnson's employment records were not available, Johnson's lawsuit against Baylor was still actively being pursued through the appeal process and Johnson's complete personnel file was easily accessible from court records in the Waco Division of the United States District Court of the Western District of Texas. These records were also in the possession of and accessible to Baylor's attorneys specially retained and in-house."

REASONS FOR DENYING THE WRIT

Petitioner asserts two reasons why this Court should grant a writ of certiorari in this case. First, Petitioner claims there is a split in the Circuit Courts of Appeals concerning complete pre-emption. Second, Petitioner claims that this case raises important recurring questions of federal law that are unresolved and that should be resolved by this Court.

In fact, this case does not conflict with other Court of Appeals' cases cited by Petitioner. More importantly,, this case does not present any significant issue that has not previously been resolved by this Court. Neither this case separately, nor when reviewed with the other Courts of Appeals' cases, justifies the granting of the writ of certiorari requested by Petitioner.

Following a discussion of the responses to Petitioner's arguments, Johnson will demonstrate that the Fifth Circuit's decision is correct regardless of the Fifth Circuit's three-part test and the facts and law applicable in this case would render review of this case pointless.

First Ground - No Conflict in the Circuits

Petitioner contends that this Court should grant a writ of certiorari to review this case because of a claimed conflict in the decision of the Circuit Courts of Appeals. Petitioner bases its contention (1) on an erroneous assertion that the Fifth Circuit has adopted a test for establishing complete pre-emption that is more stringent than tests adopted by other circuits and (2) on an erroneous assertion that this case directly conflicts with a decision of the First Circuit finding complete pre-emption in a case involving federal regulations

relating to pilot certification (i.e., "airman certificate") that, inter alia, required air carrier pilots to submit to drug testing, citing *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989).

The three-part test, stated by the Fifth Circuit in this case, is merely a restatement of the principles used by this Court in its analysis of ERISA pre-emption under *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). In *Metropolitan Life,* this Court began with the general rule that federal pre-emption is ordinarily a federal defense to a plaintiff's suit, which does not appear on the face of a well-pleaded complaint and, therefore, does not authorize removal to federal court. (*Id.* At 63) The Court then set about to determine whether or not the allegations in the plaintiff's claim(s) were "completely pre-empted" by federal law, applying the following principles:

> (1) In order for federal pre-emption to apply to convert a state law claim into a federal question for jurisdictional purposes, the federal law must include civil claim(s) that protect and displace the analogous *area* of state law. (*Id.*, at 63-64) In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), a companion case decided on the same day as *Metropolitan Life*, this Court noted that, in ERISA, Congress affirmatively set out to:
>
> > "protect...participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for

> fiduciaries of employee benefit plans, and by **providing for appropriate remedies, sanctions,** and ready access to the Federal courts. § 2 as set forth in 29 U.S.C. § 1001(b)"
> (*Pilot Life*, at 44, emphasis added)
>
> . . .
>
> "The policy choices reflected **in the inclusion of certain remedies and the exclusion of others** under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain state remedies under state law that Congress rejected in ERISA."
> (*Id.* at 54; also in *Metropolitan Life* at 64-65.)

In *Metropolitan Life* (at 64-65), this Court also noted that the "area" of the law pre-empted by Federal law may be very limited, noting the distinction between the "state tax collection suit" that the Court had decided was not pre-empted by ERISA in *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1 (1983)*, versus the "employee benefit plan" issues that were completely pre-empted in *Metropolitan Life* and *Pilot Life Ins. Co.*[4]

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[4] This Court subsequently noted the distinction between disputes involving alleged "violations of contracts between an employer and a labor organization" pre-empted by the LMRA according to *Avco Corp. v. Machinists, 390 U.S. 557 (1968)* versus individual employment contracts that are alleged to have arisen "independent of a labor contract" that were not pre-empted by the LMRA in *Caterpillar Inc. v. Williams, 482 U.S. 386, 394-395 (1987)*.

(2) In order for federal pre-emption to apply to convert a state law claim into a federal question for jurisdictional purposes, the federal law must make a specific jurisdictional grant to the federal courts for enforcement of the right. Specifically, this Court stated:

> "In the absence of explicit direction from Congress, this question would be a close one....Even with a provision such as § 502(a)(1)(B) that lies at the heart of a statute with the unique pre-emptive force of ERISA...we would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to § 301 of the LMRA, that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. But the language of the jurisdictional subsection of ERISA's civil enforcement provisions closely parallels that of § 301 of the LMRA. Section 502(f) says:
>
> > **'The district courts of the United States shall have jurisdiction**, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action. 29 U.S.C. § 1132(f)"

(*Metropolitan Life*, at 64-65, emphasis added.)

(3) There must be a clear Congressional intent that claims brought under the federal law be removable. Again, this Court noted that the Conference Report on ERISA, describing the civil enforcement provisions of § 502(a) said:

> "[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as **arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.**"
> (*Metropolitan Life*, at 65-66, emphasis added)

Thus, the Fifth Circuit's test is not overly exacting and is totally consistent with Supreme Court precedent cited above.[5]

Circuit Courts, other than the Fifth Circuit, have not necessarily expressly adopted the explicit language of the tripartite test that was applied in *Heimann v. National Elevator Indus. Pension Fund, 187 F.3d 493 (5th Cir. 1999)*

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[5] Respondent also argues that this case was correctly decided under Supreme Court precedent, regardless of the tripartite test applied by the Fifth Circuit. See discussion below in Respondent's Third Ground for Denying the Petitioner's Writ.

and in this case. However, they have generally[6] recognized and applied the same principles that were applied by this Court in *Metropolitan Life Insurance Co. v. Taylor*, and in *Caterpillar, Inc. v. Williams*, as described above.

Specifically, the following cases, cited by Petitioner as justification for the granting of the Writ sought by Petitioner, were actually correctly decided under existing Supreme Court precedent: (1) *Schmeling v. Nordam, 97 F.3d 1336 (10th Cir. 1996)* -- holding that complete pre-emption did not apply because Congress did not expressly or impliedly provide Plaintiff Schmeling with a federal cause of action to enforce FAA drug-testing laws, and noting that the ruling did not affect the Defendant's pre-emption defense (at 1344-, 1345); (2) *Strong v. Telectronics Paging Systems, Inc., 78 F.3d 256 (6th Cir. 1996)* -- holding that administrative remedies provided by federal law (i.e., MDA amendment to Federal Food, Drug, and Cosmetic Act, § 521(a), as amended, 21 U.S.C.A. § 360k(a)) were insufficient to "evince the clear manifestation of congressional intent necessary to create removal jurisdiction" and pre-emption, if any, was defensive issue (at 260-261); (3) *Rains v. Criterion Systems, Inc., 80 F.3d 339 (9th Cir. 1996)* -- holding that, although the facts relied on by Plaintiff Rains could have been the basis for a Title VII claim, Rains' "well-pleaded complaint" relied solely on state causes of action and Title VII does not pre-empt state laws that are not in conflict with it (at 344-345); (4) *Goepol v. National Postal Mail Handlers Union, 36 F.3d 306, (3rd Cir. 1994)* -- contrasting ERISA provisions with FEHBA (5 U.S.C. § 8901 et seq.) and holding that FEHBA, unlike

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[6] The decision of the First Circuit in *French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989)* will be addressed in detail below.

ERISA, did not contain a civil enforcement provision authorizing beneficiaries to bring actions to recover benefits under government employee's benefit plan; and that OPM regulations expressly provided that litigation on the claim should be brought against the carrier, but the regulations did not confer federal jurisdiction over such claims; and that, absent evidence of Congressional intent to the contrary, removal jurisdiction did not exist and pre-emption, if any, was a purely defensive issue (at 312-313; 315-317); and (5) *Rosciszewski v. Arete Associates, Inc., 1 F.3d 225 (4th Cir. 1993)* -- holding that complete pre-emption applied to Plaintiff's claims relating to state law rights, using the well-pleaded complaint rule because the state rights asserted were "equivalent to ... the exclusive rights within the general scope of copyright as specified [in the federal Copyright Act]" and were "governed exclusively by [the Act] 17 U.S.C.A. § 301(a)" and Congressional intent to completely pre-empt such claims was further evidenced by 28 U.S.C.A. § 1338(a) which provides that "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to ...copyrights...Such jurisdiction shall be exclusive of the courts of the states in ...copyright cases" (at 229, 231-232)[7].

In *Peters v. Union Pacific Railroad Company, 80 F.3d 257 (1st Cir. 1996)*, another case cited by Petitioner in

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[7] The *Rosciszewski* case also involved the issue of res judicata similar to the issue addressed by this Court in *Federated Department Stores, Inc. V. Moitie, 452 U.S. 394 (1981)* because Plaintiff brought the action as the assignee of a company that had previously asserted a federal copyright claim against the same Defendant and the federal case had been adjudicated by a consent decree entered after the parties settled the claim.

support of its requested Writ, the court reached the right result and cited appropriate applicable law, but did not necessarily address all of the issues raised in the existing Supreme Court precedent relating to complete pre-emption. The court found that the Federal Railroad Safety Act (FRSA) authorized the Department of Transportation to promulgate comprehensive regulations providing for licensing of any operator of a locomotive, and insuring that only qualified individuals would operate trains. The Court also found that the FRSA contained an express pre-emption clause that limited state laws or regulations that conflicted with regulations, rules, or orders adopted by the Secretary of Transportation, citing 45 U.S.C.S. § 434. Although, the regulations adopted by the Secretary included administrative remedies for those persons claiming to be aggrieved by the licensing/certification regulations, the court noted that Plaintiff Peters did not utilize the administrative remedies afforded by the FRSA. The court held that the pre-emption clause of the FLRA evidenced a clear and manifest purpose of Congress to pre-empt an area of state law; however, the court did not address the issue of whether or not Congress evidenced an intent to create a federal claim or to confer federal jurisdiction over the claim asserted by the Plaintiff, i.e. complete pre-emption as opposed to defensive pre-emption. Instead, the court simply concluded that the FRSA "expressly preempts state law on engineer certification disputes and because Peters failed to exhaust available administrative remedies, we affirm the district court's dismissal. Plaintiff Peters apparently chose not to pursue a Petition for Writ of Certiorari and the shortcomings of the *Peters* decision do not justify the granting of Petitioner's writ in this case.

Finally, Petitioner argues that the decision of the Fifth Circuit in this case is in direct conflict with the decision of the First Circuit in *French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989)*. Petitioner's argument is fatally flawed.

The *French* case is procedurally very distinguishable from the instant case, because the jurisdiction of the federal court in *French* was not raised on appeal. Instead the question presented for review was whether or not the district court properly "granted defendant's motion for judgment on the pleadings." (at 1) Because there was no issue relating to federal jurisdiction (aka "complete pre-emption") before the Court, the Court's opinion made no reference to *Metropolitan Life Insurance Co. v. Taylor*, nor did the opinion refer to *Caterpillar, Inc. v. Williams*. From the language of the opinion and the case law cited therein, it is clear that the Court was addressing the issue of ordinary pre-emption which was a defense to the Plaintiff's state law claim. The opinion is consistent with a later statement of this Court in *Cipollone v. Liggett Group, Inc., 505 U.S. 504, (1992)*, wherein the Court addressed the scope of defensive pre-emption under Article VI of the Constitution and under the Federal statutes applicable in that case.

Because the issues addressed in *French* were completely different from the jurisdictional issue presented in this case, the *French* case does not in any way justify the granting of Petitioner's Petition for Writ of Certiorari.

Second Ground - No Unresolved Questions of Federal Law Will Be Resolved by Granting a Writ in This Case

As noted above, this Court has thoroughly analyzed the doctrine of complete pre-emption in *Avco*, *Metropolitan Life Insurance*, *Franchise Tax Board*, and *Caterpillar*, cited previously.

In an effort to raise some unresolved issue that might justify the granting of a Writ in this case, Petitioner points to Footnote No. 4 in *Caterpillar, Inc. v. Williams*, cited supra, at 394, and argues that the first element of the Fifth Circuit test retains vestiges of a Ninth Circuit test that was rejected by this Court in FN 4 of *Caterpillar*. However, Petitioner has not and cannot explain how Footnote 4 would change the analysis or result of this case. Instead, Petitioner argues abstractly that confusion exists because of the explicit language of the Fifth Circuit's test and the inference in Footnote 4. In so doing, Petitioner ignores the fact that neither FN 4 nor the Fifth Circuit test says that a federal cause of action must provide the same relief as the state law that is pre-empted by the federal cause or causes of action on which federal jurisdiction is based. Instead, this Court and the Fifth Circuit have held that there must be one or more federal claims--not merely defense(s)--in order to invoke federal jurisdiction. (See also *Schmeling v. Nordam*, cited supra, at 1343, which draws the same conclusion with respect to the distinction between a cause of action and the relief afforded by the cause of action.)

Third Ground -- This Case was Correctly Decided

The express language of 49 U.S.C. § 44936 confirms that the statute merely provides a defense to Johnson's action in state court, and Baylor may rely on the defense in state court if Baylor can show that it complied with the terms and conditions of the statute.

The express language of Sec. (g), entitled "Limitation on liability; preemption of State law", makes the limitation on liability from state claims contingent on compliance with the terms and conditions of the statute--i.e. "Furnishing records when requested" and "using records in accordance with subsection (f)" of the Act which requires a person who is requested to furnish records to notify the applicant and to furnish to the applicant a copy of the records that are furnished to the prospective employer. Baylor must prove that it complied with all of the conditions precedent to limited liability in order to claim the statute as a pre-emptive defense to state law claims. This is pure and simple ordinary pre-emption and nothing more.

Baylor has furnished additional evidence supporting Respondent's contention that the statute merely provides a pre-emptive defense in its Petition for Writ of Certiorari on p. 17, where Baylor includes a quote from the Committee Report accompanying the Senate Bill enacted as 49 U.S.C. § 44936. The Report uses the term "immunity" to describe the limitation of liability under the PRSA. "Immunity" is a defense, not an offense. The Report further states that the immunity provisions would "prevent lawsuits" (i.e. act as a bar to suits) with respect to the furnishing or using of records against the prospective employing air carrier, as well

as the past or current employer, **"who comply with these provisions"**, i.e., who have fully complied with the conditions precedent to the existence of the immunity.

There is no language in the statute and no language in the report that expressly states or impliedly suggests that any cause of action or claim is created by the Act, nor is there any language that expressly or impliedly confers jurisdiction on federal courts for adjudicating such claims, if any. Finally, there is no language expressly stating or impliedly suggesting that a claim, if any, shall be a claim "arising under federal law", so as to convert a state claim into a federal claim for purposes of removal jurisdiction.

CONCLUSION

Petitioner has failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. There is no split among the circuits. Rather, in this case and in other cases cited by Petitioner, the Courts of Appeals and this Court have applied the same rules of law to the different facts presented in each case. Each court then reached a proper decision based on those facts. Further, this case has not been used by the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties.

Petitioner contends that the Fifth Circuit Court of Appeals used an overly exacting test and therefore reached an incorrect result in this case, despite the fact that the Court could have reached the same result using a less exacting test. Under such circumstances a review by this

Court is not favored. Further, Respondent strongly believes that the Fifth Circuit Court of Appeals was correct in its decision. This case does not merit further review by this Court.

For all of the foregoing reasons, Respondent requests that Petitioner's petition be denied.

Respectfully submitted,

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